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April 5, 2006

Jeff S. Jordan, Esq.
Supervisory Attorney
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Matter Under Review 5712

Dear Mr. Jordan:

Enclosed please find a Designation of Counsel signed by Senator John McCain in this Matter, as well as a Response to the Complaint. The complaint was received by staff in Senator McCain's office on March 22, 2006.

Sincerely Yours,

Trevor Potter /m.m.

Trevor Potter

Enclosures

RECEIVED
FEDERAL
ELECTION
COMMISSION
2006 APR -5 P 3:05

RECEIVED
FEDERAL
ELECTION
COMMISSION
OFFICE OF
COUNSEL
2006 APR -5 P 3:16

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FEDERAL ELECTION COMMISSION
Office of General Counsel
999 E Street, NW
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL
 Please use one form for each Respondent/Witness
 FAX (202) 219-3823

MUR: 5712

COUNSEL: Trevor Potter

FIRM: Caplin & Drysdale, Chartered

ADDRESS: One Thomas Circle, NW, Suite 1100

TELEPHONE - OFFICE: () 202-862-5092

FAX: () 202-429-3301

The above-named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

Date

Signature

Title

RESPONDENT/WITNESS NAME (PRINT): Senator John S. McCain

MAILING ADDRESS: 241 Russell Senate Office Building

Washington, DC 20510

TELEPHONE - HOME: ()

OFFICE: (202) 224-2235

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.

**RESPONSE AT THE FEDERAL ELECTION COMMISSION
FILED ON BEHALF OF SENATOR JOHN MCCAIN
IN MATTER UNDER REVIEW 5712**

BACKGROUND

Senator McCain agreed to appear as an "honored guest" and "speaker" at a political fundraising event co-sponsored by Californians for Schwarzenegger 2006 (Governor Schwarzenegger's re-election committee) and the California Republican Party. An invitation for this event was mailed to invitees, listing Senator McCain as a "Special Guest." The invitation contained a prominent disclaimer which stated that Senator McCain would be speaking at the event but was not soliciting any contributions, and it complied with FEC Regulations and followed the advice of relevant FEC Advisory Opinions (discussed in detail below). A clear copy of the mailed invitation is attached for the Commission's reference, as the copy that was attached to the complaint forwarded to Sen. McCain was barely legible.

Thereafter, for what appear to be perfectly predictable political reasons, the California Democratic Party filed a complaint with the FEC alleging that the invitation was defective, and attaching a press article in which Democratic Party officials are quoted making the same allegations. The quotation from Lance Olson, identified in the article as the California Democratic Party's General Counsel, gives the game way: Mr. Olson is quoted as saying that Senator McCain "is flouting, if not the letter, the intent of his own law. He couldn't raise that money for his own campaign; he shouldn't be able to raise it for somebody else." The apparent admission by Mr. Olson that the invitation is not a actual violation of the law, but rather allegedly of the law's "spirit" and therefore "should" be illegal belies the claim in the complaint that the Schwarzenegger invitation was out of compliance with federal law.

Senator McCain's well known preference is for campaign finance rules that limit individual contributions to reasonable amounts, and prohibit corporate and labor contributions to candidates and party committees. Those are the principles embodied in long-standing federal law, and in the Bipartisan Campaign Reform Act of 2002 co-sponsored by Senator McCain. However, we have a federal system of government, and numerous states have not adopted these principles. In those cases, Senator McCain's role as an active party leader and public official results in his participation in events for candidates and state party committees held under prevailing state law, provided that he ensures that he complies fully with the applicable solicitation restrictions of federal law in the process.

THE FACTS

The invitation from the Schwarzenegger campaign and the California Republican Party contained the following disclaimer, in shaded boxes designed to stand out on both the invitation itself and the reply card:

"We are honored to have Senator John McCain as our Speaker for this event. However, the solicitation for funds is being made only for Californians for Schwarzenegger and the California Republican Party. Senator McCain is not soliciting individual funds beyond federal limit, and is not soliciting funds from corporations or labor unions."

Senator McCain attended the event and spoke. He solicited no funds of any kind or amount during his remarks.

THE LAW

The Bipartisan Campaign Reform Act ("BCRA", of which Senator McCain was a co-sponsor) provides that federal candidates and officeholders shall not solicit or direct funds in connection with any election unless the funds comply with the Act's contribution limits and prohibitions. 2 USC 441i (e) (1) (A) and (B). The Commission issued rules interpreting "solicit" and "direct" in 2002. 11 CFR 300.2 (m) and (n). After those regulations were invalidated in Shays v. FEC, the Commission issued new regulations, published in the Federal Register on March 20, 2006, redefining solicit and direct. 71 Fed. Reg 13926 et seq. Between the date of the first regulations in 2002, and that of the second in 2006, the Commission issued several Advisory Opinions that explicitly addressed the question of whether a federal candidate or officeholder may appear at a fundraising event for a candidate for state office or for a state party committee, and what notices or statements must be made in connection with such appearance. See FEC Advisory Opinions 2003-03, 2003-05, and 2003-36. As the Commission has summarized these Advisory Opinions, they "permitted Federal candidate or officeholders to attend and participate in a fundraising event for non-Federal funds held by State and local candidates, or by non-Federal political organizations, so long as the solicitations made by the Federal candidate included, or were accompanied by, certain disclaimers." 71 Fed. Reg. at 13930. In the Notice of Proposed Rulemaking for the 2006 rules, and then in the Explanation and Justification of those rules, the Commission stated that it was not necessary to revisit those Advisory Opinions. They accordingly may be relied upon by persons in the same position as the requestors. 2 USC 437f(c) (2).

The first of these Advisory Opinions was AO 2003-03, issued to Congressman Eric Cantor and various Virginia elected officials, who sought advice concerning Congressman Cantor's involvement in fundraising for candidates for state office in Virginia. The Commission analysis begins by noting the restrictions of 2 USC 441i (e), and then stating:

"The Commission notes, however, that section 441i (e) does not forbid a covered person from making any solicitation of funds in connection with a non-Federal election. The Commission understands section 441i (e) to provide that a covered person may make solicitations, but may not solicit funds that are outside the amount limitations and source prohibitions of the Act."

Addressing the question whether a federal candidate or officeholder may attend a fundraising event for a state candidate or party, at which non-federal funds are to be raised, the Advisory Opinion is clear:

"Yes, mere attendance at a fundraiser where non-Federal funds are raised cannot in and of itself give rise to a violation of section 441i (e) (4) or section 300.62. A covered person may participate in any activities at such a fundraising event provided the covered person does not solicit funds outside the Act's limitations and prohibitions."

Question 3A.

The next issue is whether the federal candidate or officeholder may participate in the event as a "featured guest" or speaker. Here, the Commission concludes that he may, but that such participation may in certain circumstances constitute a solicitation which must be limited as to amount and source:

"Yes, Representative Cantor may speak at such an event, provided that by his own speech and conduct he complies with section 441i (e) (1) (B) and section 300.62 in the course of his participation in a fundraiser. Answer 3 D.

"Section 441i(e)(1) and section 300.62 do not apply to publicity for an event where that publicity does not constitute a solicitation or direction of non-Federal funds by a covered person, nor to a Federal candidate or officeholder merely because he or she is a featured guest at a non-Federal fundraiser.

"In the case of publicity, the analysis is two-fold: First, whether the publicity for the event constitutes a solicitation for donations in amounts exceeding the Act's limitations or from sources prohibited from contributing under the Act; and, second, whether the covered person approved, authorized, or agreed or consented to be featured or named in, the publicity. If the covered person has approved, authorized, or agreed or consented to the use of his or her name or likeness in publicity, and that publicity contains a solicitation for donations, there must be an express statement in that publicity to limit the solicitation to funds that comply with the amount limitations and source prohibitions of the Act. 2 U.S.C. 441i (e) (1) (B); 11 CFR 300.62." Answer 3 C.

Thus, if a candidate or officeholder DOES solicit funds for a non-federal event, he or she must make it clear that the funds he or she is soliciting are only those permitted under federal law. As the Commission states the rule:

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"Yes. Representative Cantor may ask for funds in connection with a State election or direct funds in connection with such an election as long as he does not ask for funds that are in excess of the amounts permitted with respect to contributions to candidates under 2 U.S.C. 441a (a), or that are from sources prohibited by the Act from making contributions in connection with an election for Federal office. 2 U.S.C. 441i (e) (1)." Answer 1 A

Subsequent to Advisory opinion 2003-03, the Commission further elaborated on some of these same issues in Advisory opinion 2003-36, issued to the Republican Governor's Association. The Commission summarized its advice as follows:

"In Advisory Opinion 2003-03, the Commission addressed appearances, speeches, and solicitations by a Federal candidate or officeholder at fundraising events for non-Federal candidates where federally impermissible funds were being raised. The Commission interpreted the Act and regulations to permit oral solicitations, and signatures on written solicitations, by a covered individual, so long as the solicitations included or were accompanied by a message adequately indicating that the covered individual is only asking for Federally permissible funds. See 2 U.S.C. 441i (e) (1) (B); 11 CFR 300.62. The following is considered to be an adequate disclaimer: I am asking for a donation of up to \$5,000 per year. I am not asking for funds from corporations, labor organizations, or other Federally prohibited sources."

The Commission restated its position, in the converse, as follows:

"2. With respect to the RGA Conference Account, may a covered individual sign or appear on written solicitations, such as signing invitation letters, or appear as a featured guest or speaker at a fundraising event, where the donations solicited exceed the Act's amount limits or are from prohibited sources but the solicitation does NOT include a notice that the covered individual is not raising funds outside the amount limits and source prohibitions of the Act? [emphasis added]

No, the covered individual may not so participate under those circumstances. The requirements described above in response to questions 1.a, 1.b, and 1.c are applicable to the situations described in question 2, including the need for the notice that the covered individual is asking for funds only up to the applicable limits of the Act, and is not asking for funds outside the limitations or prohibitions of the Act.
Answer 2

ANALYSIS

As reviewed above, regulations, and applicable Advisory opinions, make it clear that

- a federal candidate or officeholder may be a featured guest and speaker at an event for a state candidate or party
- the event may raise non-federal funds (those in excess of federal limits or from sources not permitted in federal elections)
- the federal candidate, however, may not solicit non-federal funds at the event
- therefore, to the extent that the federal candidate solicits funds for the event, the communications must include "a message adequately indicating that the covered individual is only asking for Federally permissible funds." Advisory opinion 2003-36.

The solicitation at issue in this complaint met the standards established by The Commission and described herein. Senator McCain was identified as an "Honored Guest" and "speaker" in the invitation. The invitation contained a solicitation by the hosts (for non-federal funds, and also contained the specific statement that Senator McCain was not making the solicitation for those funds ("We are honored to have Senator John McCain as our Speaker for this event. However, the solicitation for funds is being made only by Californians for Schwarzenegger and the California Republican Party"). Arguably, the flat disclaimer that Senator McCain was not making the solicitation for funds should have been sufficient by itself. However, out of caution the invitation went on to restate the disclaimer recommended by the Commission in Advisory Opinions 2003-03 and 2003-36, in case anyone might think Senator McCain was soliciting funds despite the clear declaration to the contrary. Thus, the final line on the disclaimer read "Senator McCain is not soliciting individual funds beyond federal limit, and is not soliciting funds from corporations or labor unions."

Complainants allege that this disclaimer would have been clear if it had gone on to state the specific individual funds Senator McCain was NOT soliciting, such as funds in excess of \$2,100 per election, or \$4,200 for the primary and general, for a candidate, or in excess of \$10,000 for the federal account of a state party. However, having already stated that only the state party and Governor were soliciting funds at all; it would have been even more confusing to then add a laundry list of funds not being solicited by Senator McCain. Further, no matter complainant's preferences, the requirement of "notice that the covered individual is asking for funds only up to the applicable limits of the Act, and is not asking for funds outside the limitations or prohibitions of the Act" was explicitly met.

CONCLUSION

For the above reasons, the Federal Election Commission should find that the invitation to the fundraiser for Governor Schwarzenegger and the California Republican Party

complained of in MUR 5712 in fact complied with all requirements of federal law, and accordingly should dismiss the complaint as being without merit.

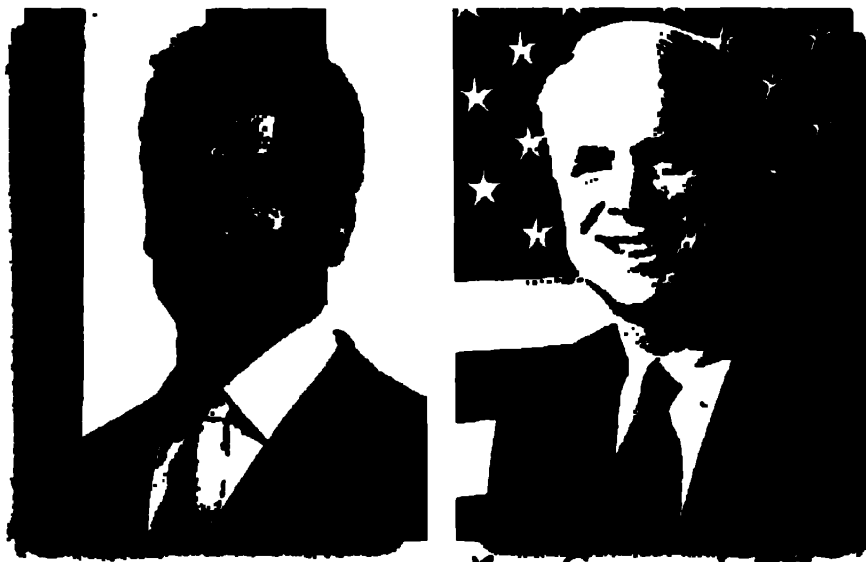
Respectfully,

Trevor Potter / m.m.

Trevor Potter
Counsel

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SPRING INTO ACTION



*with Governor Arnold Schwarzenegger
and Special Guest Senator John McCain*

Platinum

ADELE & BENY ALAGEM
 AVERY & ANDY BARTH
 KATHY & FRANK BAXTER
 BILL BLOOMFIELD, JR.
 TINA & RICK CARUSO

KELLY & ROBERT DAY
 JOAN & JOHN HOTCHKIS
 CATHERINE & JOHN B. KILROY, JR.
 THE NEW MAJORITY LOS ANGELES
 ASHLEY & DAN S. PALMER, JR.

MARGIE & JERRY PERENCHIO
 WILLIAM A. ROBINSON
 FAYE & ALEX SPANOS
 TERRY SEMEL

Gold

JAMES CAMERON
 JAMI & KLAUS HEIDEGGER
 MIKE MCGEE & OLGA CASTELLANOS-MCGEE
 TAWNY & JERRY SANDERS
 GREG STUBBLEFIELD

Silver

MICHELLE & TONY ANDERSON
 DONNA TUTTLE & DAVID ELMORE
 DAVE HELWIG
 MICHAEL R. LOMBARDI
 EVA & MARC STERN
 BETTY & JOE WEIDER

Bronze

MICHELLE & HAMID BAHER
 RUTH & JAKE BLOOM
 LINDA & JERRY BRUCKHEIMER
 PETER CHERNIN
 SARAH & BRETT DAVIS
 BARRY FISHER
 ERICA & ROGER GREAVES
 JERI & KEN HARMAN

FRITZ HITCHCOCK
 ROBERT W. HUSTON
 VICKI & JIMMY IOVINE
 SANAZ & SAIED KASHANI
 GERALD L. KATELL
 BLISS & PATRICK KNAPP
 SUZANNE & ALLEN M. LAWRENCE
 PAULA KENT-MEEHAN

NANCY & ROBERT PHILIBOSIAN
 DAVID G. PRICE
 GEORGE SCHAEFFER
 CINDY & SANDY SIGAL
 SHEILA & ROBERT SNUKAL
 MIMI SONG
 GAVIN HACHIYA WASSERMAN

SPRING INTO ACTION
with
GOVERNOR ARNOLD SCHWARZENEGGER
and Special Guest
SENATOR JOHN MCCAIN
at
THE BEVERLY HILTON
9876 WILSHIRE BOULEVARD
BEVERLY HILLS

MONDAY, MARCH 20, 2006
5:30 GENERAL RECEPTION AND SILENT AUCTION
6:00 HOST COMMITTEE RECEPTION
7:00 DINNER

BUSINESS ATTIRE

CONTACT GINA BLOCK OR RENEE CROCE
TEL: 310-450-2117 FAX: 310-450-1761

We are honored to have Senator John McCain as our Speaker for this event. However, the solicitation for funds is being made only by Californians for Schwarzenegger and the California Republican Party. In accordance with federal law, Senator McCain is not soliciting individual funds beyond federal limits, and is not soliciting funds from corporations or labor unions.

"SPRING INTO ACTION"

with GOVERNOR SCHWARZENEGGER

and Special Guest SENATOR JOHN MCCAIN

MONDAY, MARCH 20, 2006 at THE BEVERLY HILTON

I AGREE TO GIVE/RAISE:

- ☐ **PLATINUM SPONSOR:** \$100,000 (\$44,000 TO CFPBG PLUS \$55,400 TO CRP)
HEAD TABLE SEATING WITH GOVERNOR FOR 2 PEOPLE, 1 TABLE OF 10 WITH PREMIERE SEATING, 12 TICKETS FOR THE HOST COMMITTEE RECEPTION, 6 PHOTOS WITH THE GOVERNOR (2 PEOPLE PER PHOTO)
- ☐ **GOLD SPONSOR:** \$50,000 (\$44,000 TO CFPBG PLUS \$5,400 TO CRP)
HEAD TABLE SEATING WITH GOVERNOR FOR 1 PERSON, 1 TABLE OF 10 WITH PREMIERE SEATING, 6 TICKETS FOR THE HOST COMMITTEE RECEPTION, 3 PHOTOS WITH THE GOVERNOR (2 PEOPLE PER PHOTO)
- ☐ **SILVER SPONSOR:** \$25,000 (\$22,500 TO CFPBG PLUS \$2,500 TO CRP)
1 TABLE OF 10 WITH PREFERRED SEATING, 4 TICKETS FOR THE HOST COMMITTEE RECEPTION, 2 PHOTOS WITH THE GOVERNOR (2 PEOPLE PER PHOTO)
- ☐ **BRONZE SPONSOR:** \$10,000 (To CFPBG)
1 TABLE OF 10, 2 TICKETS FOR THE HOST COMMITTEE RECEPTION, 1 PHOTO WITH THE GOVERNOR (2 PEOPLE PER PHOTO)
- ☐ **INDIVIDUAL TICKET(S):** \$1,000 (To CFPBG)
- PLEASE RESERVE _____ TICKET(S) AT \$1,000 EACH
- ☐ **I/WE ARE UNABLE TO ATTEND BUT WILL CONTRIBUTE \$ _____ TO CFPBG.**

THE FOLLOWING INFORMATION IS REQUIRED:

NAME: _____ SPOUSE: _____
 ADDRESS: _____
 CITY: _____ STATE: _____ ZIP: _____
 PHONE: _____ FAX NUMBER: _____
 E-MAIL ADDRESS: _____
 OCCUPATION: _____ RETIRED: _____
 EMPLOYER: _____

AMOUNT OF CONTRIBUTION TO CFPBG: \$ _____ AMOUNT OF CONTRIBUTION TO CRP: \$ _____

CREDIT CARD CONTRIBUTIONS: ☐ MASTERCARD ☐ VISA ☐ AMERICAN EXPRESS

CREDIT CARD #: _____ EXPIRATION DATE: _____

IF THIS IS A CORPORATE CARD, BY LAW IT WILL BE CONSIDERED A CORPORATE DONATION.

NAME AS IT APPEARS ON THE CARD: _____

IS THIS A CORPORATE CARD? ☐ YES ☐ NO IF YES, CORPORATION NAME: _____

BILLING ADDRESS (IF DIFFERENT): _____

AUTHORIZED SIGNATURE (MUST BE THE SAME AS NAME ON THE CARD): _____

CONTRIBUTIONS TO EACH COMMITTEE MUST BE MADE BY SEPARATE CHECKS AND MAILED TO:

CALIFORNIANS FOR SCHWARZENEGGER 2006 CALIFORNIA REPUBLICAN PARTY
 TAX ID #99-5776483 FPPC #1261886 TREASURER *STATE ID #810163 FEDERAL ID #C001450890

C/O GINA BLOCK, 3110 MAIN STREET, SUITE 225, SANTA MONICA, CA 90405 • PHONE 310-450-2117
 OR YOU MAY FAX THIS FORM TO 310-450-1761

Contributions for Schwarzenegger 2006: Contributions to Californians for Schwarzenegger are not deductible for federal income tax purposes. This collection raises funds for Governor Schwarzenegger's re-election in 2006. The maximum legal contribution to CFS-06 is \$44,000 (\$22,500 for the primary election and \$22,500 for the general election). A contributor may contribute to both the primary and general elections now and may write a single check. All contributions received prior to the primary election will be designated for the primary election up to the contributor's contribution limit. Any contributions received from a contributor totaling more than \$22,500 will be designated for the general election. Individuals, businesses, corporations and general PAC contributions are permissible. Contributions from public employees unless PACs will not be accepted. Foreign Nationals are prohibited from making contributions to this committee, unless they have permanent residency status in the United States of America. Spouses and adult children may each give \$44,000 by separate check signed by the spouse or adult child or by credit card transaction authorized by the spouse or adult child. Please enclose separate checks or credit card authorization.

California Republican Party: Contributions to California Republican Party are not deductible for federal income tax purposes. There is no limit on contributions to CRP. Corporate contributions will be used in California state elections. Individual contributions will be used in both federal and California state elections and may also be made in any amount. Contributions to CRP will be allocated as follows: up to \$27,500 per calendar year for direct state candidate support. Any amount in excess of \$27,500 will be used for permissible non-direct candidate support purposes. Such contributions may also be used for federal Level account purposes, up to \$10,000 per individual, corporate or PAC donor.

We are honored to have Senator John McCain as our Speaker for this event. However, the collection for funds is being made only by Californians for Schwarzenegger and the California Republican Party. In accordance with federal law, Senator McCain is not soliciting individual funds beyond federal limit, and is not soliciting funds from corporations or labor unions.

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